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In the Supreme Court of the United States

October Term, 1983

JANET E. PITTS, Administratrix, etc.,
Petitioner,

vs.

UNARCO INDUSTRIES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether an unaccrued cause of action for personal injury is a form of property subject to protection under the due process clause of the Fourteenth Amendment to the United States Constitution, so as to prevent a state from terminating a plaintiff's right to assert a cause of action, by imposition of a statute of repose, at a time before which the plaintiff could not reasonably have known of the existence of that cause of action.

2. Whether a ten year statute of repose comports with the requirements of the equal protection clause of the Fourteenth Amendment to the United States Constitution, when that statute as applied absolutely bars petitioner and others similarly situated from asserting a cause of action due to the nature of the instrumentality which is the proximate cause of the injury complained of.

LIST OF PARTIES

The plaintiff-appellant in this case is Janet E. Pitts, Individually and as Administratrix of the Estate of Donald E. Pitts, deceased. The defendants-appellees in this case are GAF Corporation, Armstrong World Industries, Inc., Nicolet, Inc., Rock Wool Manufacturing Company, Inc., and Forty-Eight Insulation Company.

Title 28 U.S.C. §2403(b) may apply. No court below has certified to the Indiana Attorney General the fact that the constitutionality of the Indiana Statute was drawn into question.

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No.

In the Supreme Court of the United States

October Term, 1983

JANET E. PITTS, Administratrix, etc.,
Petitioner,

vs.

UNARCO INDUSTRIES, INC., et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit**

Petitioner, Janet E. Pitts, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on July 11, 1983.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 712 F.2d 276 (1983) and appears in the Appendix. The Opinions of the District Court for the Southern District of Indiana are unreported and appear in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on July 11, 1983. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Indiana Code §33-1-1.5-5:

This section applies to all persons regardless of minority or legal disability. Notwithstanding I.C. 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrued more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Amendment XIV, §1, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 14, 1981, Janet E. Pitts, individually and as Administratrix of the Estate of Donald E. Pitts, deceased, filed a product liability action against respondents and other manufacturers of asbestos-containing prod-

ucts. The Complaint alleged that the respondents had failed to warn petitioner's decedent, Donald E. Pitts, of the dangers inherent in the use of respondents' asbestos-containing products, products to which he had been exposed during his 30-year career as an asbestos insulation mechanic. As a result of his exposure to respondents' products, petitioner alleged that her decedent developed the asbestos-related disease of bronchogenic carcinoma (lung cancer) and died on April 4, 1980. The Complaint articulated claims for both wrongful death and loss of consortium, grounded on strict liability, negligence, implied warranty and conspiracy theories of liability. Petitioner sought both compensatory and punitive damages. Jurisdiction was founded upon Title 28 U.S.C. §1332.

As a result of certain pretrial rulings, the petitioner was left with a cause of action in wrongful death against respondents, predicated upon negligence and strict liability in tort. On May 27, 1982, respondent, Fibreboard Corporation, filed a motion for partial summary judgment on behalf of all defendants. On the same day respondent, Rock Wool Manufacturing Company, Inc., filed a similar motion for partial summary judgment. Both motions were predicated on the Indiana Product Liability Act's ten year "statute of repose", set forth in Indiana Code §33-1-1.5-5.

Asbestos, the inhalation of which by petitioner's decedent was the proximate cause of injury, is a mineral which has been used extensively in industrial and residential insulation. Since 1918, a substantial body of knowledge has been developed concerning the hazards involved in exposure to asbestos fibers. As early as 1934, it was known that the latency period, the period between inhalation and the development of disease symptoms, was prolonged and varied from ten to thirty years. It is also known generally in the medical and scientific community

that exposure to asbestos-containing dusts is the cause of asbestosis and mesothelioma (a rare cancer of the lining of either the pleura or the peritoneum). Further, since the mid-1940's there has been a substantial body of knowledge which links asbestos exposure and cigarette smoking to the development of bronchogenic carcinoma. Despite the existence of and the respondents' awareness of this body of knowledge, no warning regarding any hazard involved with exposure to asbestos was placed on asbestos-containing insulation products until the mid-1960's.

Medical and scientific knowledge, evolving over the past fifty years, has ratified the early finding that there is a prolonged period between initial exposure to asbestos and the development of any disease processes which are discoverable by an individual.

No research to date has found asbestos fibers to be less toxic with age. Asbestos, being a mineral, does not degrade with the passage of time, and as a result, asbestos-containing insulation which was placed into service 30, 40, or even 50 years ago has the same toxic propensity today as it had when it was originally placed into service.

Disregarding the available medical and scientific information and without providing petitioner an opportunity to oppose respondents' motions, the Trial Court granted the motions on June 1, 1982. Petitioner's counsel filed a motion for reconsideration and brief in opposition, which motions were subsequently overruled.

Based upon the June 1, 1982 order, the Trial Court granted appellees' motions for complete summary judgment. The Trial Court concluded that Donald E. Pitts was not exposed to an asbestos-containing product delivered by respondents to an initial user or consumer after December 14, 1971, and therefore, that petitioner's claims were barred by the Indiana Product Liability ten year statute of repose.

Subsequently, a timely appeal was perfected to the United States Court of Appeals for the Seventh Circuit. In its decision dated July 11, 1983, the Seventh Circuit Court of Appeals affirmed the Trial Court ruling.

REASONS FOR GRANTING A WRIT

To bar the petitioner and others from asserting a cause of action before the cause of action could have accrued, as is permitted by the decision below, is irrational and arbitrary and violative of her due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

The products liability law of the State of Indiana contains both a statute of limitations and a statute of repose. The statute of repose bars the filing of suit where a defective product was sold to a user or consumer more than ten years before the date of accrual of the cause of action. I.C. §33-1-1.5-5.

Due process requires that petitioner be given a meaningful hearing at a meaningful time. *Armstrong v. Manzo*, 380 U.S. 545 (1965). A cause of action has been deemed not to accrue until the plaintiff is "armed with all the facts." *United States v. Kubrick*, 444 U.S. 111 (1981). Once the cause of action has accrued, this Court has found a species of property to exist which is not susceptible to denial without due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

By erroneously treating the statute of repose as a statute of limitations, the court of appeals found that the petitioner had no property interest in a yet-unaccrued cause of action, relying on the dicta of *Silver v. Silver*,

280 U.S. 117 (1929). However, in light of *Logan* and *Kubrick*, petitioner asserts that she cannot be deprived of the inchoate property interest, implicitly recognized by those decisions, purely through legislative fiat. Particularly when that fiat is unreasonable, arbitrary, and serves no legitimate State interest.

The petitioner's position comports fully with prior holdings of this Court. Eighty-one years ago, this Court held that a statute of limitations must provide a party a full opportunity to present his claim in court. *Wilson v. Iseminger*, 185 U.S. 55 (1902). This Court stated that a statute of limitations would be unlawful if it attempted to extinguish rights arbitrarily, whatever the purpose of its provisions. A statute of limitations must provide a reasonable time "for the commencement of an action before the bar takes effect." *Terry v. Anderson*, 95 U.S. 628 (1877); *United States v. Morena*, 245 U.S. 392 (1918).

If the State's interest in a statute of limitations is primarily barring the assertion of stale claims, then the State must articulate some reasonable basis for a statute of repose which bars even the accrual of a cause of action. A statute of limitations is predicated upon dilatory activity or inactivity on the part of a prospective plaintiff; the statute of repose in the Indiana Products Liability statute relies upon serendipity. The nature of the product, and not the fact of injury, determines whether or not petitioner's cause of action will be allowed to accrue. This is in direct contravention to the holdings of this Court. It is unreasonable in barring, because of the lapse of time prior to their accrual, the rights to a cause of action when those rights could not have been exercised. *Lamb v. Powder River Livestock Co.*, 132 F. 434 (8th Cir. 1904).

The United States Court of Appeals for the Seventh Circuit held that there is a legitimate State interest in creating various sub-classes of tort plaintiffs, based upon whether their cause of action is one in negligence or product liability, and whether the instrumentality causing injury in a products liability suit was first sold more than ten years from the date the cause of action accrued. The State interest cited by the Court was one of reducing the risk to manufacturers when they place a product in the stream of commerce.

The first question to be addressed is whether the relief of manufacturers of defective products is a legitimate State interest. What possible interest could the State have in siding with culpable defendants and imposing upon an injured innocent plaintiff the burden of his injury? *Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132 (1980). The interest articulated by the Seventh Circuit is clearly illegitimate and any lines drawn pursuant to that illegitimate interest ought to be stricken.

Assuming however that the State interest is to alleviate manufacturers from liability on machines which have caused injury after their useful life, then the Legislature has elected an impermissible means of affecting that end.

The line drawn by the Indiana Legislature must bear some rational relationship to the legitimate State interest. *City of New Orleans v. Duke*, 427 U.S. 297 (1976). There is no rational relationship here. While machines may have useful lives and may wear out in use, a toxic mineral, such as asbestos, does not become less toxic with the passage of time. Therefore, the ten year statute of repose unconstitutionally deprives the petitioner of her cause of action by placing her in a sub-class of product liability plaintiffs, which class is not based upon any reasonable, rational relationship to a legitimate State interest.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

(Decided July 11, 1983)

No. 82-2071

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANET E. PITTS,
Plaintiff-Appellant,

v.

UNARCO INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

No. 81 C 1334—CALE J. HOLDER, JUDGE

Before CUMMINGS, *Chief Judge*, COFFEY, *Circuit Judge*,
and ASPEN, *District Judge*.*

CUMMINGS, *Chief Judge*. The principal issues in this appeal are whether plaintiff was denied a fair opportunity to oppose defendants' motions for summary judgment and whether an unaccrued cause of action for wrongful death is a species of property protected by the Fourteenth

*The Honorable Marvin E. Aspen, District Judge of the Northern District of Illinois, is sitting by designation.

Amendment and abrogated by the applicability of a ten-year Indiana statute of limitations.

Some 20 months following the death of her husband from lung disease, plaintiff, a resident of Indiana, commenced this wrongful death diversity action against 16 corporations, all residents of other states. Plaintiff alleged that each did business in Indiana and was involved at some stage in the production and distribution in Indiana of products containing asbestos. Plaintiff's husband had been an asbestos insulation mechanic during the years 1950 through 1979 and she claimed that asbestos-containing products produced and distributed by defendants caused his death. She sought \$1,500,000 in compensatory damages and \$1,000,000 in punitive damages. Her complaint was in five counts: Count I charged negligence; Count II, strict liability; Count III, breach of implied warranties of merchantability and fitness; Count IV, conspiracy to keep from the public information about the health risks associated with asbestos; and Count V charged loss of consortium. Plaintiff abandoned Count V and on May 13, 1982, the trial court dismissed with prejudice Counts III and IV for failure to state a claim for relief, and struck from the complaint plaintiff's prayer for punitive damages. This appeal does not question these rulings. But on June 9th, the court granted final summary judgment in favor of six defendants on Counts I and II.¹ This appeal is from that summary judgment.

I

Plaintiff first claims that she did not have an adequate opportunity to oppose the remaining six defendants' summary judgment motions. On June 1st before granting

1. A seventh defendant had been dismissed for want of service and the other nine settled with plaintiff.

those motions, the trial court ruled that the ten-year statute of limitations in Indiana's Product Liability Act, Ind. Code § 33-1-1.5-5 (1981),² applied to plaintiff's wrongful death suit, and that under that statute unless it appeared that each defendant had delivered an asbestos-containing product to plaintiff's husband or his employer within the ten-year period preceding the date plaintiff filed suit, her claim against that defendant would be time-barred. When the trial court issued this ruling, plaintiff had yet to present her argument about which statute of limitations should apply, and she claims that she was entitled to an opportunity to do so. But the ruling was not a judgment of any sort; it was simply a preliminary statement of the court's understanding of the law after having read several defense motions and supporting memoranda that had been filed five days earlier. Plaintiff had ample opportunity to respond to those motions and to challenge the court's understanding of the law and did so by filing a motion to reconsider on June 3 and two supporting briefs and affidavits on June 4 and 7. On June 7 and 8 the court considered the respective submissions and oral arguments of the parties in open court (plaintiff's App. 231-236; defendants' App. 89-92) before determining whether any defendants had delivered asbestos-containing products during the 10 years preceding

2. Indiana Code § 33-1-1.5-5 (Burns IC 34-4-20A-5) provides:

33-1-1.5-5 Statute of limitations

Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

the commencement of this suit and whether the ten-year statute of limitations barred suit. Plaintiff thus fully responded to defendants' motions—by filing affidavits and two briefs challenging, on constitutional and choice-of-law grounds, the applicability of the ten-year statute of limitations. Plaintiff had further opportunity to pursue those arguments during the June 7 and 8 hearings.

While plaintiff's motion to reconsider mentioned Local Rule 10 of the Southern District of Indiana providing 15 days to file opposition to a summary judgment motion, she merely requested

"an opportunity to present a response to the motion for partial summary judgment and further, for an opportunity to present in open court argument and testimony regarding the issues raised in the motions for partial summary judgment filed on behalf of all defendants in this matter." (Defendants' App. 86.)

Since she was accorded that opportunity, no reversible error was committed in receiving her affidavits and briefs on June 4 and 7 and considering her submissions and oral argument on June 7 and 8 before granting the summary judgment motions on June 9.

II

Second, plaintiff contends that the ten-year statute of limitations was tolled by defendants' fraudulent concealment of their tortious conduct. This contention was not advanced below and therefore need not be considered for the first time on appeal. *Ohio Casualty Insurance Co. v. R.J. Ryneerson*, 507 F.2d 573 (7th Cir. 1974). Nevertheless, plaintiff argues in her reply brief that Count IV of the complaint contains an allegation of fraudulent concealment, but that Count was dismissed with prejudice

on May 13, almost four weeks before summary judgment was granted, and plaintiff has not challenged that dismissal on this appeal. In any event, the allegations in Count IV are insufficient to charge defendants with fraudulent concealment.³

Rule 9(b) of the Federal Civil Rules requires that fraud be pleaded with particularity. The only particular conduct charged in Count IV is that defendants withheld information from the public. Passive silence, however, is insufficient to trigger the fraudulent concealment doctrine. *Morgan v. Koch*, 419 F.2d 993, 998-999 (7th Cir. 1969); *French v. Hickman Moving & Storage*, 400 N.E.2d 1384 (Ind. App. 1980).

3. Paragraph 37 of conspiracy Count IV realleges paragraphs 1 through 36 of the complaint, but plaintiff does not assert that any of those paragraphs raised fraudulent concealment. The remainder of Count IV is as follows:

38. Defendants, collectively and individually, have possessed since at least 1929 medical and scientific data which clearly indicated that asbestos-containing products were hazardous to the health and safety of plaintiff's decedent, Donald E. Pitts, and others exposed to asbestos-containing products.

39. Defendants, collectively and individually, knew or reasonably should have anticipated that plaintiff's decedent, Donald E. Pitts, and others in his position would be exposed to the asbestos-containing products produced by the defendants.

40. Defendants, prompted by pecuniary motives, collectively and individually, ignored and failed to act upon said medical and scientific data and conspired to deprive the public, and in particular the users of asbestos-containing products and their families of this information, thereby denying plaintiff's decedent, Donald E. Pitts, and others exposed to asbestos-containing products of the opportunity of free choice as to whether to be exposed to the asbestos-containing products produced by the defendants.

41. Defendants' conduct complained of above directly and proximately caused the plaintiff's decedent's injuries and death.

42. By reason of the premises, defendants are liable, jointly and severally, to the plaintiff for the injuries and damages described above. (Plaintiff's App. 49-50.)

III

Plaintiff's third claim is that the ten-year statute of limitations in the Product Liability Act is unconstitutional as applied to her because it deprives her of property without due process of law. An accrued cause of action is a right of property protected by the Fourteenth Amendment, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422; an unaccrued cause of action is not. *Silver v. Silver*, 280 U.S. 117, 122; *Munn v. Illinois*, 94 U.S. 113, 134; *Martin v. Pittsburg & L.E.R. Co.*, 203 U.S. 284, 295; *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir. 1978), certiorari denied, 439 U.S. 1002; *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970). The Indiana legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute, Ind. Code § 34-1-1-2 (1981), remains on the books in case their spouses are ever killed because of someone else's negligence. Such a hope is protected by the voting booth, not by the federal courts. *Munn v. Illinois*, 94 U.S. 113, 134. Plaintiff's cause of action had not yet accrued when the Indiana legislature adopted the ten-year statute of limitations contained in the Product Liability Act. Her right to sue for her husband's wrongful death vested when her husband died, *Fisk v. United States*, 657 F.2d 167 (7th Cir. 1981); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981), and he died some two years after the Product Liability Act was passed. The change in the law therefore caused her no loss of property.

Even if she had a property right in this unaccrued cause of action, we cannot accept plaintiff's argument that the Indiana Product Liability Act's ten-year statute of repose violates due process under the federal and

Indiana Constitutions. An identical argument was rejected by the Indiana Supreme Court in another asbestos case (after the briefing herein) as to the three-year limitations contained in the Indiana Occupational Diseases Act. *Bunker v. National Gypsum Company*, 441 N.E.2d 8 (1982). In *United States v. Kubrick*, 444 U.S. 111, 117, the constitutionality of a two-year federal statute of limitations was assumed for the following reasons:

Statutes of limitations which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States v. Marion*, 404 U.S. 307, 322, n.14 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, K. & T. R. Co. v. Harriman*, 227 U.S. 657, 672 (1913); *Bell v. Morrison*, 1 Pet. 351, 360 (1828).

Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat

its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895); *Bell v. Morrison*, *supra*, at 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, a Minnesota six-year statute of limitations was sustained over charges that it violated the due process and equal protection clauses of the Fourteenth Amendment.

The above examples are sufficient to persuade us that plaintiff's due process argument must be rejected.

IV

Plaintiff's final claim is that applying to her suit the ten-year limitations statute denies her "the equal protection of the laws" guaranteed by the Fourteenth Amendment. The ten-year limitations rule creates two classes of people: those injured by products more than ten years old and those injured by products less than ten years old. Those in the first class are prevented from bringing suit upon the same causes of action that those in the second class can bring. The effect of this is to lessen the risk of loss—i.e., from having to pay for injuries resulting from use of a defective product—manufacturers face when they place a product into the stream of commerce. That is a legitimate legislative purpose, and it is not the courts' business to instruct the Indiana legislature when it is better for consumers than producers to bear that risk. See *Simpson v. United States*, 652 F.2d 831, 833-834 (9th Cir. 1981); *DiAntonio v. Northampton-Accomack Memorial Hospital*, 628 F.2d 287, 291 (4th Cir. 1980).

In *Bunker v. National Gypsum Company, supra*, also involving an asbestos-related disease, the Indiana Supreme Court rejected an equal protection clause argument similar to plaintiff's.⁴ And the Supreme Court of the United States did likewise in a related setting in *Chase Securities Corp., supra*.

Since the privileges and immunities clause in Article I, Section 23 of the Indiana Constitution affords plaintiff the same protection as does the Fourteenth Amendment Equal Protection Clause, *Huff v. White Motor Corp.*, 609 F.2d 286, 298 (7th Cir. 1979); *Haas v. South Bend Community School Corp.*, 289 N.E.2d 495 (Ind. 1972), we reject for the same reasons plaintiff's claim under that provision. And again *Bunker, supra*, is on point because there the three-year statute of limitations in the Indiana Occupational Diseases Act was held "to be constitutional in all respects" (441 N.E.2d 14) even though dissenting Justice Hunter thought its application would "defy * * * the privileges and immunities guaranteed our citizens * * *" (441 N.E.2d 18).

Pitts was not left without recourse by this statute of limitations. Since nine defendants could not take advantage of the statute, they were not immunized and indeed settled with plaintiff (note 1 *supra*), thus vitiating Pitts' claim that the statute contravened the Indiana privileges and immunities clause by conferring blanket immunity to all asbestos producers. Instead the statute must be sustained as reflecting the legislative twin goals of (a) repose and (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence.

Judgment affirmed.

4. See also *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585 (Ind. Sup. Ct. 1980).

**ENTRY OF RULING ON LIMITATION OF ACTIONS
OF THE UNITED STATES DISTRICT COURT**

(Dated June 1, 1982)

No. IP 81-1334-C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANET E. PITTS, Individually, *et al.*,

v.

JOHNS-MANVILLE SALES CORPORATION,
a Delaware Corporation, *et al.*

ENTRY OF RULING ON LIMITATION OF ACTIONS

The defendants have presented the issue of the statute of limitations in various ways and the Court being advised in the matter does now file its ruling.

Donald E. Pitts died April 4, 1980 and the claim of Jane E. Pitts, as administratrix of the estate of Donald E. Pitts, deceased, as alleged in counts one and two of the complaint accrued under the Indiana Wrongful Death Statute on April 4, 1980. IC 34-1-1-2 (Burns). Both counts one (tortious negligence) and two (tortious strict liability) of the complaint are based upon tortious product liability claims and are governed by Burns IC 34-4-20A-1 through 34-4-20A-8(b) which statute includes a section on limitation of actions. Burns IC 34-4-20A-5.

Counts one and two of the complaint alleged that the decedent was employed as an asbestos insulation mechanic from approximately 1950 through 1979; and that he was

exposed during this time to asbestos, asbestos dust, and asbestos fibers which he inhaled and ingested from defendants' asbestos-containing products which proximately caused him to develop an asbestos related disease of lung cancer that caused his death. The complaint is not specific as to when the products of each of the defendants were manufactured, sold, or delivered and used by Mr. Pitts during the period 1950 through 1979. Such facts must be developed in trial.

It is therefore ADJUDGED, by way of ruling on all pending motions raising such limitation of action issues and also by way of advance ruling on the issue where it is raised by affirmative defenses of answer, or by way of motions of all defendants, that the plaintiff's, Janet E. Pitts, as administratrix, actions alleged in counts one and two of the complaint are BARRED as to that claim or claims or part of a claim or claims against a defendant or defendants that is based upon the alleged asbestos products of a defendant or defendants that was or initially were delivered to Mr. Pitts or his employer more than ten (10) years before December 14, 1981, when this action was commenced.

Count five of the complaint is two actions by Janet E. Pitts, individually for loss of consortium of the decedent prior to the date of his death on April 4, 1980. The actions are based upon the same facts and theories of counts one (tortious negligence) and two (tortious strict liability) of the counts. The actions in count five are subject to the limitations of action provisions of the Indiana Products Liability, Burns IC 34-4-20A-5, providing her causes of action did not accrue before June 1, 1978, the effective date of the action, as Burns 34-4-20A-8(b) provides that the act *"does not apply to a cause of action that accrues before June 1, 1978"*.

It is therefore ADJUDGED, by way of ruling on all pending motions raising a limitation of action issue and also by way of advance ruling on the issue where it is raised by affirmative defenses of answer, or by way of motions, of all defendants, that the plaintiff, Janet E. Pitts, as an individual, alleged in her actions in count five of the complaint are BARRED as to that claim or claims or part of a claim or claims against a defendant or defendants that accrued to her since June 1, 1978 and and more that [sic] two years prior to commencement of this action on December 14, 1981. Burns IC 34-4-20A-5 and IC 34-4-20A-8(b); and is also BARRED if the alleged asbestos products of a defendant or defendants that was or were initially delivered to Mr. Pitts or his employer was more than ten (10) years before December 14, 1981, when her actions were commenced, Burns IC 34-4-20A-5; and is also BARRED if plaintiff's actions were commenced on December 14, 1981 and was more than two years from the accrual of her actions which accrual occurred more than eight (8) years but less than ten (10) years from the date the alleged asbestos products of a defendant or defendants that was initially delivered to Mr. Pitts or his employer and such accrual date of Mrs. Pitts' action was after June 1, 1978, the effective date of the Indiana Products Liability Act, Burns IC 34-4-20A-5 and 34-4-20A-8(b).

If the actions of Mrs. Pitts accrued prior to June 1, 1978, the effective date of the Products Liability Act, then the Indiana general limitation of actions statute of two years governs. Burns IC 34-1-2-2 and Burns IC 34-4-20A-8(a)(b). It is then ADJUDGED that if Mrs. Pitts commenced her actions in count five of the complaint on December 14, 1981 and such commencement was more than two (2) years after the accrual of her action which accruals occurred prior to June 1, 1978 then such actions

would be and are BARRED. Burns IC 34-1-2-2 and Burns IC 34-4-20-8(a) (b).

The defendants are reminded that the statute of limitation defenses must be affirmatively pleaded under the Federal Rules of Civil Procedure and the Court's advance ruling does not waive that requirement.

Dated this 1 day of June, 1982.

/s/ CALE J. HOLDER

*Judge, United States District
Court Southern District of
Indiana*

**JUDGMENT OF THE UNITED STATES
DISTRICT COURT**

(Dated June 9, 1982)

Cause No. IP 81-1334C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

JANET E. PITTS, Admin., et al.,
Plaintiffs,

vs.

JOHNS-MANVILLE SALES CORP., et al.,
Defendant.

JUDGMENT

This cause came on to be heard on the motions of the defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc.,

GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company for summary judgment pursuant to Trial Rule 56, Federal Rules of Civil Procedure, and the Court having considered the respective submissions and oral arguments of the parties in open court on June 8, 1982, and having found that there is no genuine issue of material fact, and having concluded that defendants are entitled to judgment as a matter of law, it is hereby ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgment be granted, and it is further

ORDERED, ADJUDGED and DECREED that there is no just reason for delay and that final judgment is entered in favor of defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc. GAF Corporation, Nicolet Incorporated, and Armstrong Cork Company, and against the plaintiff on Count I and Count II of the complaint.

Dated this 9 day of June, 1982.

/s/ CALE J. HOLDER

*Judge, United States District
Court for the Southern
District of Indiana*

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE UNITED STATES DISTRICT COURT**

(Dated June 9, 1982)

Cause No. IP 81-1334C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANET E. PITTS, Admin., et al.,
Plaintiffs,

vs.

JOHNS-MANVILLE SALES CORP., et al.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on Defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company, Motions for Summary Judgment. The Court, being duly advised in the premises and having considered the respective submissions and arguments of the parties in open court on June 8, 1982, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are undisputed:

1. Janet E. Pitts, administratrix of the estate of Donald Pitts, filed the Complaint herein on December 14, 1981, of which two counts remain, tortious negligence

and strict liability, alleging that Donald Pitt's [sic] death on April 4, 1980, was caused by his exposure to asbestos-containing products manufactured by various defendants.

2. Donald Pitts worked as an asbestos insulation worker for approximately thirty (30) years.

3. Defendant Unarco Industries, Inc. is incorporated under the laws of the State of Delaware and has its principal place of business in the State of Illinois; defendant Rock Wool Manufacturing Company, Inc. is incorporated under the laws of the State of Alabama and has its principal place of business in the State of Alabama; defendant Forty-Eight Insulations, Inc., is incorporated under the laws of the State of Illinois and has its principal place of business in the State of Illinois; defendant GAF Corporation is incorporated under the laws of the State of Delaware and has its principal place of business in the State of New York; defendant Nicolet, Incorporated in [sic] incorporated under the laws of the State of Delaware and has its principal place of business in the State of Pennsylvania; and Armstrong Cork Company is incorporated under the laws of the State of Pennsylvania and has its principal place of business in Pennsylvania.

4. The decedent, Donald Pitts, was a resident of the State of Indiana at the time of his death, residing within the jurisdictional boundaries of the United States District Court for the Southern District of Indiana.

5. Plaintiff's decedent, Donald E. Pitts, was not exposed to any asbestos-containing products delivered by Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, or Armstrong Cork Company, respectively to an initial user or consumer after December 14, 1971.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all parties in this matter. Furthermore, this Court has jurisdiction over the subject matter of this cause of action. 28 U.S.C. Section 1332 (1976).

2. The law applied in this case was the law of the forum, the State of Indiana. *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

3. Plaintiff's claims against the defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company, under either tortious negligence or strict liability are barred by the ten (10) year statute of limitations of the Indiana Product Liability Act. IND. CODE Section 33-1-1.5-5 (BURNS Section 34-4-20A-5).

4. Defendants' Motions for Summary Judgment will be granted and final judgment will be entered in this case in favor of Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company, in accordance with these findings of fact and conclusions of law, and pursuant to Rules 54(b) and 56 of the Federal Rules of Civil Procedure. The Court further concludes that there is no just reason for delay in entering judgment in this case.

Judgment will be entered accordingly, and Counts I and II of plaintiff's complaint will be dismissed as against these defendants.

DATED: June 9, 1982.

/s/ CALE J. HOLDER

Judge, United States District
Court for the Southern
District of Indiana

**JUDGMENT ENTRY OF THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

(Dated July 11, 1983)

No. 82-2071

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANET E. PITTS,
Plaintiff-Appellant,

vs.

UNARCO INDUSTRIES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana,
Indianapolis Division.

No. 81 C 1334

Judge Cale J. Holder

JUDGMENT—ORAL ARGUMENT

Before HON. WALTER J. CUMMINGS, *Chief Judge*; HON.
JOHN L. COFFEY, *Circuit Judge*; HON. MARVIN E. ASPEN,
District Judge.*

This cause was heard on the record from the United
States District Court for the Southern District of Indiana,
Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND
ADJUDGED by this Court that the judgment of the said
District Court in this cause appealed from be, and the
same is hereby, AFFIRMED, with costs, in accordance
with the opinion of this Court filed this date.

*The Honorable Marvin E. Aspen, District Judge of the
Northern District of Illinois, is sitting by designation.